Supreme Court, U.S.
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No. 98-1447

In The

Supreme Court of the United States

October Term, 1998

DAVID L. SMITH,

Petitioner,

v.

U S WEST DIRECT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTIONS PRESENTED

Whether the Tenth Circuit correctly determined that Petitioner lacked standing to appeal orders entered in the underlying employment dispute between Renee Marks and U S WEST.

Whether the Tenth Circuit correctly determined that Petitioner's appeal from the order denying his motion to intervene was untimely.

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I. RESTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

Petitioner David L. Smith recommended the following questions for review:

> Whether by dismissing Mr. Smith's appeal in the present case for alleged lack of standing to appeal, while refusing to address the issues (including those relating to his standing to appeal independent from that of his former client, Renee Marks) raised and argued by him in his appellate briefs, the Tenth Circuit deprived Mr. Smith of his First Amendment right to petition the government for a redress of grievances and his Fifth Amendment right to due process of law, including his right to appeal a final decision by a district court and to receive meaningful review of that decision under 28 U.S.C. § 1291.
>
> Whether the Tenth Circuit also violated Mr. Smith's Sixth Amendment right to self-representation, including his right to proceed pro se under 28 U.S.C. § 1654.
>
> Whether unless this Court grants Mr. Smith's petition for a writ of certiorari, the Tenth Circuit's threat to prosecute him for criminal contempt will chill (or freeze) the exercise of these constitutional and statutory rights in other cases being pursued by him.
>
> Whether the United States Court of Appeals for the Tenth Circuit has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as

> to call for an exercise of this Court's supervisory power; and has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Petitioner attempts to create the impression that this case involves significant constitutional questions concerning his right to represent a plaintiff in an employment dispute between a former employee of U S WEST (Plaintiff Renee Marks) and U S WEST. However, the Tenth Circuit never had occasion to consider those issues. Instead, as will be discussed more fully below, the Tenth Circuit correctly ruled that Petitioner lacked standing to appeal several orders that he sought to challenge on appeal, and also correctly ruled that Petitioner's appeal from an order denying his motion to intervene in the employment dispute was untimely. Accordingly, a more accurate description of the questions presented for review are:

> Whether the Tenth Circuit correctly determined that Petitioner lacked standing to appeal orders entered in the underlying employment dispute between Renee Marks and U S WEST.

> Whether the Tenth Circuit correctly determined that Petitioner's appeal from the order denying his motion to intervene was untimely.

II. STATEMENT OF THE CASE

On November 29, 1993, Petitioner David L. Smith was suspended from the practice of law before the United States Court of Appeals for the Tenth Circuit. *In re Smith*,

10 F.3d 723, 724 (10th Cir. 1993), *cert. denied*, 513 U.S. 807, *and reh'g denied*, 513 U.S. 1033 (1994).[1] On February 10, 1995, the United States District Court for the District of Colorado entered a Disciplinary Order suspending Petitioner from practicing before the District Court until the Tenth Circuit lifted its suspension order.

On October 10, 1995, Renee Marks, a former employee of U S WEST, filed a complaint in state court generally alleging discrimination on the basis of her national origin (French), under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Plaintiff was represented in the state court action by Petitioner. On November 2, 1995, U S WEST timely removed the action to the United States District Court for the District of Colorado. On November 6, 1995, the District Court, *sua sponte*, issued the following minute order: "Because plaintiff's attorney is not allowed to practice in the U.S. District Court, it is ORDERED that plaintiff may have 30 days to obtain substitute counsel." [See Appendix, Exhibit 1]

On December 19, 1995, the District Court granted Plaintiff Renee Marks' Motion to Clarify Status of Legal Representation. The Court entered a Minute Order which provided, in pertinent part: "FURTHER ORDERED that plaintiff's motion to clarify is granted, the Court will consider plaintiff pro se until she obtains counsel who is permitted to practice in the United States District Court."

---

[1] Mr. Smith was subsequently disbarred and his name was struck from the list of attorneys allowed to practice before the Tenth Circuit. *In re Smith*, 76 F.3d 335, 335 (10th Cir.), *cert. denied*, 117 S. Ct. 186, *and reh'g denied*, 117 S. Ct. 448 (1996).

[See Appendix, Exhibit 2] Plaintiff Marks then filed a Motion for Protective Order and Motion to Permit Mr. Smith to Represent Ms. Marks on a Hardship Basis, which the District Court denied on April 30, 1996. [See Appendix, Exhibit 3] Mr. Smith then filed a Motion to Intervene, which was denied on June 21, 1996. [See Appendix, Exhibit 4]

Mr. Smith filed a Notice of Appeal from these Orders on February 2, 1998. With respect to the Order denying Mr. Smith's Motion to Intervene, the Tenth Circuit found that since the Order was issued on June 21, 1996, the Notice of Appeal was untimely. As to the other Orders entered by the District Court, the Tenth Circuit ruled that Mr. Smith lacked standing to pursue an appeal.

III. REASONS FOR DENYING THE PETITION

The Petitioner references all of the considerations contained in SUP. CT. R. 10(a), (c) (1999) as the basis for his request that this Court grant his Petition for Writ of Certiorari. Upon review of his argument, however, Petitioner fails to show how the decision of the Tenth Circuit is in conflict with other Courts of Appeals or that it "has so far departed from the accepted and usual course of judicial proceedings." In fact, the Tenth Circuit's decision rested on well settled principles governing the time to file an appeal and governing standing to appeal. Moreover, the issues presented for review are not sufficiently novel, complex or unsettled to merit this Court's review.

A. THE TENTH CIRCUIT'S RULING THAT PETITIONER LACKS STANDING TO PURSUE THIS APPEAL IS CONSISTENT WITH EXISTING PRECEDENT.

It is well-settled that a nonparty does not have standing to appeal. *Matter of Leaf Tobacco Bd. Of Trade*, 222 U.S. 578, 581 (1911). Petitioner is not, nor has he ever been, a party to the underlying Title VII dispute between Ms. Marks and U S WEST. Instead, he was merely her attorney of record in the state court proceeding before the action was removed to federal court. Therefore, he cannot base his claim on the legal rights or interests of Ms. Marks. *Conn v. Gabbert*, No. 97-1802, 1999 U.S. LEXIS 2345, at *12-13, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (April 5, 1999); *quoting Warth v. Seldin*, 411 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Status as former counsel for plaintiff does not establish in Petitioner standing to appeal orders entered in the underlying litigation. *Gabbert*; *Uselton v. Commercial Lovelace Motor Freight, Inc.*, 9 F.3d 849, 854 (10th Cir. 1993) (Counsel have standing to appeal from orders issued directly against them, but not from orders applicable only to their clients).

B. THE TENTH CIRCUIT'S RULING THAT PETITIONER'S APPEAL OF THE DENIAL OF HIS MOTION TO INTERVENE WAS UNTIMELY IS CONSISTENT WITH EXISTING PRECEDENT.

"[W]hen an order prevents a putative intervenor from becoming a party in any respect, the order is subject to immediate review." *Stringfellow et al. v. Concerned*

Neighbors in Action et al., 480 U.S. 370, 377, 107 S.Ct. 1177, 94 L.Ed.2d 389 (1987); *citing Railroad Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 524-25, 67 S.Ct. 1387, 91 L.Ed.2d 1646 (1947). In *Railroad Trainmen*, this Court found the District Court's order denying intervention was "by necessity subject to immediate review, because the applicant '[could] not appeal from any subsequent order or judgment in the proceeding . . . ' " *Stringfellow*, at 377; *quoting Railroad Trainmen*, at 524.

In this case, the District Court's order denying Petitioner's motion to intervene was issued on June 21, 1996. Because the order was subject to immediate review, it should have been appealed within thirty days. FED. R. APP. P. 4(a)(1). Petitioner did not file a notice of appeal until February 2, 1998, over a year and a half later. Therefore the Tenth Circuit correctly determined that it lacked jurisdiction to hear the appeal.

IV. CONCLUSION

The Tenth Circuit's determination that Petitioner lacked standing to appeal orders entered in the underlying proceeding is consistent with this Court's prior opinions. Additionally, the Tenth Circuit's determination that Petitioner should have appealed the order denying his motion to intervene within thirty days is also consistent

with this Court's prior opinions. As such, the questions presented do not merit this Court's review.

DATED this 9th day of April, 1999.

Respectfully submitted,

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Counsel for Respondent

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Zita L. Weinshienk

Civil Action No. 95-Z-2781

RENEE MARKS,

Plaintiff,

v.

U S WEST DIRECT,

Defendant.

MINUTE ORDER

(Filed Nov. 6, 1995)

ORDER ENTERED BY JUDGE ZITA L. WEINSHIENK

Joan E. Boline, Administrative Secretary

Dated: November 6, 1995

Because plaintiff's attorney is not allowed to practice in U.S. District Court, it is ORDERED that plaintiff may have 30 days to obtain substitute counsel.

November 6, 1995

Civil Action No. 95-Z-2781

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the above date copies of MINUTE ORDER entered by Judge Zita L. Weinshienk and filed on November 6, 1995, were mailed to the following:

David L. Smith, Esq.
1630 Welton Street, Suite 300
Denver, CO 80202

Renee Marks
3501 South Stover, #9-201
Fort Collins, CO 80525

H. Perry Ryon, Esq.
U S WEST, Inc.
Law Department
1801 California Street, Room 5100
Denver, CO 80202

JAMES R. MANSPEAKER, Clerk

By /s/ Charlotte Hoard
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Zita L. Weinshienk

Civil Action No. 95-Z-2781

RENEE MARKS,

Plaintiff,

v.

U S WEST DIRECT,

Defendant.

MINUTE ORDER

(Filed Dec. 19, 1995)

ORDER ENTERED BY JUDGE ZITA L. WEINSHIENK

Joan E. Boline, Administrative Secretary

Dated: December 19, 1995

It is ORDERED that defendant's Motion For Substitution Of Counsel is granted, and Raymond W. Martin is substituted for H. Perry Ryon as counsel for defendant. It is

FURTHER ORDERED that defendant's request that attorney Elizabeth Kushibab's name be deleted from this case is granted. It is

FURTHER ORDERED that plaintiff's motion to clarify is granted, and the Court will consider plaintiff pro se until she obtains counsel who is permitted to practice in the United States District Court. David Smith cannot

appear in the United States District Court, and therefore he does not have to be "removed." Because Mr. Smith's status will not be relitigated in this action, plaintiff's request concerning Mr. Smith is moot. It is

FURTHER ORDERED that plaintiff shall use the correct caption as indicated above.

December 19, 1995

Civil Action No. 95-Z-2781

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the above date copies of MINUTE ORDER entered by Judge Zita L. Weinshienk and filed on December 19, 1995, were mailed to the following:

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Magistrate Judge Bruce D. Pringle

courtesy copy to:

David L. Smith
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Denver, CO 80202

JAMES R. MANSPEAKER, Clerk

By /s/ Charlotte Hoard
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Zita L. Weinshienk

Civil Action No. 95-Z-2781

RENEE MARKS,

Plaintiff,

v.

U S WEST DIRECT,

Defendant.

MINUTE ORDER

(Filed April 30, 1996)

ORDER ENTERED BY JUDGE ZITA L. WEINSHIENK

Joan E. Boline, Administrative Secretary

Dated: April 30, 1996

It is ORDERED that Plaintiff's Motion For A Protective Order, And Motion To Permit Mr. Smith To Represent Ms. Marks On A Hardship Basis are denied.

April 30, 1996

Civil Action No. 95-Z-2781

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the above date copies of MINUTE ORDER entered by Judge Zita L. Weinshienk and filed on April 30, 1996, were mailed to the following:

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Magistrate Judge Bruce D. Pringle

courtesy copy to:

David L. Smith
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JAMES R. MANSPEAKER, Clerk

By /s/ Charlotte Hoard
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Zita L. Weinshienk

Civil Action No. 95-Z-2781

RENEE MARKS,

Plaintiff,

v.

U S WEST DIRECT,

Defendant.

MINUTE ORDER

(Filed June 21, 1996)

ORDER ENTERED BY JUDGE ZITA L. WEINSHIENK

Joan E. Boline, Administrative Secretary

Dated: June 21, 1996

It is ORDERED that David L. Smith's Motion to Intervene Pursuant To Fed. R. Civ. P. 24 is denied.

June 21, 1996

Civil Action No. 95-Z-2781

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the above date copies of MINUTE ORDER entered by Judge Zita L. Weinshienk and filed on June 21, 1996, were mailed to the following:

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Magistrate Judge Bruce D. Pringle

JAMES R. MANSPEAKER, Clerk

By /s/ Charlotte Hoard
Deputy Clerk